Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-403

In The

Supreme Court of the United States

October Term, 1985

ZBIGNIEW SCHELLER,

Petitioner,

v.

AMERICAN MEDICAL INTERNATIONAL, INC., a foreign corporation for profit, PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., a Florida corporation for profit, FREDERICK P. HOBIN, M.D., and T. R. BRUCE, JR.,

Respondents.

On Petition for Writ of Certiorari To the Florida Supreme Court

BRIEF IN OPPOSITION TO JURISDICTION

MERCER K. CLARKE, ESQ.
SMATHERS & THOMPSON, P.A.
1301 Alfred I. duPont Building
169 E. Flagler Street
Miami, Florida 33131
and
MARK HICKS, ESQ.
DANIELS & HICKS, P.A.
2400 New World Tower
100 N. Biscayne Boulevard
Miami, Florida 33132-2513

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Pages
A. JURISDICTION	2
1. The Writ is Directed to the Wrong Court	2
2. Scheller Has Failed to Preserve a Federal Constitutional Issue	3
B. REPLY TO DR. SCHELLER'S STATEMENT OF THE CASE AND FACTS	5
C. ARGUMENT—THE REASONS WHY THE WRIT SHOULD BE DENIED	6
CONCLUSION	9

TABLE OF AUTHORITIES

TABLE OF CASES CITED

Beck v. Washington, 369 U.S. 541 (1962)	3
Callender v. Florida, 383 U.S. 270 (1966)	2
Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968)	2
Livingston v. State, 441 So. 2d 1083 (Fla. 1983)	7
Webb v. Webb, 451 U.S. 493 (1981)	3, 4, 5

OTHER AUTHORITIES CITED

28 USC § 1257	2
Fla.R.App.P. 9.030(a)(2)(A)(iv), Article V, Section 3b, Florida Constitution (1980)	3

No. 85-403

In The

Supreme Court of the United States

October Term, 1985

ZBIGNIEW SCHELLER,

Petitioner,

v.

AMERICAN MEDICAL INTERNATIONAL, INC., a foreign corporation for profit, PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., a Florida corporation for profit, FREDERICK P. HOBIN, M.D., and T. R. BRUCE, JR.,

Respondents.

On Petition for Writ of Certiorari To the Florida Supreme Court

BRIEF IN OPPOSITION TO JURISDICTION

Respondents, AMERICAN MEDICAL INTERNATIONAL, INC., PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., FREDERICK P. HOBIN, M.D. and T.R. BRUCE, JR., (hereinafter AMI) respectfully request that the Petition for Writ of Certiorari be denied because no federal question was preserved in the Florida State Court and because the facts of record establish that there has been no denial of Due Process under the United States Constitution.[1]

[1] Dr. Scheller's Appendix shall be designated "A. ——", while AMI's Appendix shall be designated "App. ——".

A. Jurisdiction

Rule 21.1(h) of this Court requires that the petitioner specify the appellate court in which the federal questions sought to be reviewed were raised. In the present case, Dr. Scheller purports to comply with this Rule by asserting that a Writ of Certiorari should be issued to the Supreme Court of Florida because that is the Court where the alleged federal constitutional question was first raised. There are two fundamental problems with this argument which prove that Dr. Scheller has failed to establish a jurisdictional basis for review of this case.

1. The Writ is Directed to the Wrong Court

Pursuant to 28 USC § 1257, the Supreme Court of the United States may review decrees rendered " . . . by the highest court of a State in which a decision could be had . . . ." This statute has been interpreted not to include decisions of State Supreme Courts which deny discretionary review or find that no jurisdiction exists to consider the merits of a particular case. *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676 (1968); *Callender v. Florida,* 383 U.S. 270 (1966). However, where a writ of certiorari is directed to the wrong court, this Court has, nevertheless, evaluated the jurisdictional issue as if it had been directed to the proper court. *Interstate Circuit, Inc., supra, Callender, supra.*

In the present case, Dr. Scheller's petition for Writ of Certiorari is directed to the Supreme Court of Florida. The Supreme Court of Florida did not decide the merits of Dr. Scheller's case. Rather, the Supreme Court of Flo-

rida simply determined that it lacked jurisdiction to hear the case because Dr. Scheller failed to demonstrate that the decision of the Fourth District "expressly and directly" conflicted with a decision of another district court of appeal or of the Supreme Court. Fla.R.App.P. 9.030(a)(2)(A)(iv), Article V, Section 3b, Florida Constitution (1980).

Undoubtedly, Dr. Scheller directed his petition for Writ of Certiorari to the Supreme Court of Florida because the first time he chose to argue a deprivation of constitutional rights was in an amended brief on jurisdiction in the Supreme Court of Florida. However, a review of that argument reveals that no deprivation of rights under the United States Constitution was claimed. (A-85). Dr. Scheller's one sentence argument was limited to a claimed violation of the Florida Constitution. (A-85). At no time during the proceedings in the Fourth District Court of Appeal did Dr. Scheller raise either a state or federal constitutional issue. As will be demonstrated below, this renders his petition before this Court fatally defective.

2. Scheller Has Failed to Preserve a Federal Constitutional Issue

In order to be entitled to raise a federal constitutional issue before this Court, it is incumbent upon a party to raise and properly preserve the federal constitutional issue in the highest state court which decided the merits of the case. *Webb v. Webb,* 451 U.S. 493 (1981); *Beck v. Washington,* 369 U.S. 541 (1962).

In *Webb, supra,* a mother was granted custody of her minor child by a Florida state court. The father was subsequently awarded custody by a Georgia state court, which award was affirmed by the Georgia Supreme Court. The mother sought certiorari in this Court on the ground that Georgia failed to give full faith and credit to the Florida decree. In dismissing the mother's appeal on the ground of lack of jurisdiction, this Court reasoned as follows:

> This Court has frequently stated that when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.
>
> • • •
>
> Although petitioner did use the phrase "full faith and credit" at several points in the proceedings below, nowhere did she cite to the Federal Constitution nor to any cases relying on the Full Faith and Credit Clause of the Federal Constitution.

451 U.S. at 495-96.

> [3] It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented.

451 U.S. at 496-97.

> At the minimum however, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

451 U.S. at 501.

An examination of the record in the Fourth District reveals that Dr. Scheller filed an "En Banc Motion to Vacate Court's Decision and to Transfer Case to Another District Court for Resolution". This motion argued that under *Florida law* Judge Beranek should have recused himself. Thus, Dr. Scheller argued, the decision of the Fourth District should have been vacated and the entire case transferred to another Florida District Court of Appeal for resolution. (A-55-57). No federal constitutional issues were argued in the motion and the Fourth District did not address any such issues in denying the motion. (A-66-68). Consequently, pursuant to this Court's decision in *Webb, supra,* Dr. Scheller has failed to establish the jurisdictional prerequisite to consideration of this case on the merits.

In addition, even if the jurisdictional proceedings in the Supreme Court of Florida were relevant to this issue (which is denied), it is clear from the record that no federal constitutional question was raised and preserved in that court. (A-85). Accordingly, it is respectfully submitted that no jurisdiction exists.

B. Reply to Dr. Scheller's Statement of the Case and Facts

Dr. Scheller's statement of the underlying facts on pages 4 through 6 of his brief is unsupported by any record references whatsoever. It is our position that this recitation of the facts is totally inaccurate and that the facts contained in the Fourth District's opinion correctly describe the merits of the claim filed by Dr. Scheller below. (A-5-27). However, whether the decision below

was correctly decided under Florida law is not presently before this Court. Rather, Dr. Scheller claims that he has been unfairly prejudiced because ". . . the Fourth District's decision had been authored by Judge Beranek, and it was subsequently discovered that while sitting on this case Judge Beranek had been discussing future employment with Larry Klein, one of the attorneys representing Respondents; and that subsequent to leaving the bench, Beranek had in fact gone into partnership with Larry Klein . . . ." Consequently, AMI will limit its discussion to the facts relevant to the Motion to Vacate filed by Dr. Scheller. In order to avoid repetition, we will refer to those facts in the argument section of this response.

C. Argument—The Reasons Why the Writ should be Denied

In the unlikely event this Court determines that Dr. Scheller properly preserved a federal constitutional question below, AMI contends that his "appearance of impropriety" argument is factually inaccurate and legally insufficient.

Dr. Scheller implies that because the decision was published just prior to Judge Beranek leaving the bench, he must necessarily have decided the case while negotiating his partnership agreement with Larry Klein. Thus, Dr. Scheller concludes that there was an appearance of impropriety. The problem with this surmise is that it is not supported by any *facts*.

To the contrary, the official record of the Fourth District conclusively establishes that Judge Beranek fin-

ished drafting the opinion on October 18, 1983, but the opinion was not released until July 13, 1984 (9 months later). (App. 7-8). The record also demonstrates that Judge Glickstein concluded his review of the file on November 30, 1983. The delay in publishing the opinion resulted from the lengthy period of time that Judge Rupert Smith kept the file in drafting his dissent. (App. 7-8). The Fourth District's record also establishes that Judge Beranek "noted" Judge Smith's dissent the same day that Judge Smith signed off on the file and that Judge Glickstein "noted" the dissent a few days later. (App. 7-8).

Based upon the Fourth District's own records, it is clear that the facts would not ". . . place a reasonably prudent person in fear of not receiving a fair and impartial trial." *Livingston v. State,* 441 So. 2d 1083, 1087 (Fla. 1983). A judge who decides a case nine months before he leaves the bench to go into private practice with a law firm, cannot, without more, create an appearance of impropriety. There has simply been no showing that Judge Beranek decided this case or any other case involving Larry Klein *after he decided to leave the bench and after he and Mr. Klein had substantive discussions* about forming a partnership. There is no rule of ethics or of judicial conduct which in any way makes the facts of record appear improper.

It is also significant to note that Dr. Scheller filed an extensive Motion for Rehearing from the original panel's decision. Because Judge Beranek had already left the Court, Judge Downey was assigned to the case. Judge Downey reviewed the merits of the motion for rehearing and concurred in the original panel's decision.

In addition, Dr. Scheller's Motion to Vacate requested an en banc determination by the court. Six judges of the Fourth District denied the en banc motion and two judges recused themselves from consideration of the en banc motion.

It is apparent from the foregoing that no appearance of impropriety exists in this case as a result of Judge Beranek's participation in the decision nine months prior to leaving the bench. It is also our position that actual impropriety, as opposed to an appearance of impropriety, would be necessary to establish a denial of due process. Dr. Scheller has not cited a case to the contrary. Thus, Dr. Scheller's arguments on the merits are totally without merit.

In any event, this issue was presented to the Fourth District Court of Appeal solely under Florida law and it was decided pursuant to Florida law. Consequently, this case is inappropriate for review by this Court.

———o———

CONCLUSION

Based upon the foregoing, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MERCER K. CLARKE, ESQ.
SMATHERS & THOMPSON, P.A.
1301 Alfred I. duPont Building
169 E. Flagler Street
Miami, Florida 33131
and
MARK HICKS, ESQ.
DANIELS AND HICKS, P.A.
2400 New World Tower
100 N Biscayne Boulevard
Miami, Florida 33132-2513
(305) 374-8171

Attorneys for Respondent

By: MARK HICKS

APPENDIX
TO
BRIEF IN OPPOSITION TO JURISDICTION

TABLE OF CONTENTS

1. RESPONSE TO EN BANC MOTION TO VACATE COURT'S DECISION AND TO TRANSFER CASE TO ANOTHER DISTRICT COURT FOR RESOLUTION ..... App. 1-8

2. BRIEF OF RESPONDENT ..... App. 9-20

3. RESPONSE TO AMENDED BRIEF OF PETITIONER ON JURISDICTION ..... App. 21-23

IN THE DISTRICT COURT OF APPEAL,
OF FLORIDA

FOURTH DISTRICT

CASE NO.: 80-1650

AMERICAN MEDICAL INTERNATIONAL INC., et al.,

Appellants,

vs.

ZBIGNIEW SCHELLER,

Appellee.

---/

RESPONSE TO EN BANC MOTION TO VACATE COURT'S DECISION AND TO TRANSFER CASE TO ANOTHER DISTRICT COURT FOR RESOLUTION

Appellants, American Medical International, Inc., et al., (hereafter AMI) oppose Dr. Scheller's so-called "En Banc Motion to Vacate Court's Decision and to Transfer Case to Another District Court for Resolution" on the following grounds:

1. Dr. Scheller seeks to have his motion to vacate and to transfer decided by this Court en banc. Rule 9.331 (a) of the Florida Rules of Appellate Procedure provides that "En banc hearings and rehearings *shall not be ordered* unless necessary to maintain uniformity in the court's decisions." Dr. Scheller did not move for a rehearing en banc and he does not contend in his en banc motion to vacate that there is a need to maintain uniformity in the court's decisions. Accordingly, since the Rules of Appellate Procedure expressly prohibit en banc hearings except to maintain uniformity of decisions, Dr. Schel-

ler's motion should be denied. In addition, Dr. Scheller has not cited a rule of procedure or statute which permits one district court of appeal to transfer a case to another district court of appeal. Thus, Dr. Scheller's motion is totally without merit.

2. The sole basis for Dr. Scheller's motion to vacate the decision of this Court is that ". . . there is an appearance of impropriety in former Judge Beranek's having rendered a decision in a case where counsel for one of the parties is an attorney with whom John Beranek was discussing future employment while sitting on the case . . . ." Dr. Scheller's motion is nothing more than a frivolous attempt to get a "second bite at the apple."

As noted in Dr. Scheller's motion, Florida law requires that a judge recuse himself where there is an appearance of impropriety. However, the standard for determining whether such an appearance of impropriety exists is that there must be ". . . *facts* alleged [which] would place a *reasonably prudent person* in fear of not receiving a fair and impartial trial." *Livingston v. State*, 8 F.L.W. 420 (Fla. 1983).

Prior to demonstrating that there are no facts upon which a reasonably prudent person could fear that Judge Beranek was not impartial in this case, AMI contends that Dr. Scheller has failed to comply with the requirements of Florida Statute § 38.10 and the Florida Rules of Civil Procedure, Rule 1.432.[1] However, even if Dr. Scheller's

---

[1] For example, Section 38.10 requires a certificate of counsel that such affidavit and application are made in good faith. The affidavits mandated by the Statute and Rule require allegations of facts and not hearsay as contained in Dr. Scheller's affidavit.

motion was procedurally correct, it is totally without merit because Judge Beranek is no longer considering the case. Instead, a new judge has been, or will be, assigned to consider the motion for rehearing. Thus, the issue is moot.

In any event, Dr. Scheller's motion is legally insufficient. Dr. Scheller implies that because the decision was published just prior to Judge Beranek leaving the bench, he must necessarily have decided the case while negotiating his partnership agreement with Larry Klein. Thus, Dr. Scheller concludes that there is an appearance of impropriety. The problem with this surmise is that it is not supported by any *facts,* as required by *Livingston, supra.*

To the contrary, had Dr. Scheller bothered to look at the court file in this case, he would have found the official record of this Court which conclusively establishes that Judge Beranek finished drafting the opinion on October 18, 1983, but the opinion was not released until July 13, 1984 (9 months later). (See Exhibit A attached hereto). The record also demonstrates that Judge Glickstein concluded his review of the file on November 30, 1983. The delay in publishing the opinion resulted from the lengthy period of time that Judge Rupert Smith kept the file in drafting his dissent. This Court's record also establishes that Judge Beranek "noted" Judge Smith's dissent the same day that Judge Smith signed off on the file and that Judge Glickstein "noted" the dissent a few days later. (Exhibit A).

Based upon the Court's own records, it is clear that the *facts* would not ". . . place a reasonably prudent person in fear of not receiving a fair and impartial trial."

Livingston, supra. A judge, who decides a case nine months before he leaves the bench to go into private practice with a law firm cannot without more create an appearance of impropriety. There has simply been no showing that Judge Beranek decided this case or any other case involving Larry Klein *after he decided to leave the bench and after he and Mr. Klein* had substantive discussions about forming a partnership. There is no rule of ethics or of judicial conduct which in any way makes the facts of record appear improper.

While AMI contends that this alone justifies the denial of Dr. Scheller's motion, our position is further supported by Judge Beranek's telephone conversation with the undersigned counsel. Parenthetically, it is important to note that AMI believes that Dr. Scheller's and Edna Caruso's hearsay statements about what John Beranek said to Mr. Montgomery and Mr. Sarola are hearsay and they should not be considered in deciding this motion. However, out of an abundance of caution, the undersigned will summarize his discussions with John Beranek in the event this Court elects to consider these matters.

After Larry Klein's Motion to Withdraw was filed, counsel for Dr. Scheller called John Beranek. Mr. Beranek telephoned the undersigned to relate the substance of those conversations and he stated that he was doing so in order to be fair to both sides. Mr. Beranek stated that he told plaintiff's counsel that he had authored the opinion long before he entertained any notions of leaving the bench and that the reason the opinion was not published soon after it was drafted was because Judge Smith had not submitted his dissent to the Fourth District until the end of June, 1984. Mr. Beranek also stated that no

changes were made on the opinion after Judge Smith returned the file. Mr. Beranek further indicated that plaintiff's counsel asked him to write a letter to the Court outlining everything that had occurred.

After Dr. Scheller filed his en banc motion, the undersigned called Mr. Beranek to determine whether the following statement contained in the motion was accurate:

> "Judge Beranek suggested to counsel for Plaintiff that an alternative available, in order to avoid any appearance of impropriety, was for him to contact the Fourth District or write a letter to the Fourth District suggesting that in his opinion a rehearing should be granted in this case."

Mr. Beranek stated that he did not tell plaintiff's counsel that in order to avoid an appearance of impropriety ". . . in his opinion a rehearing should be granted in this case."

Dr. Scheller ends his argument with a request which is nothing short of ridiculous. Dr. Scheller wants this case transferred to another district court of appeal because "subconsciously" this Court might not want to rule in a manner inconsistent with Judge Beranek. Aside from the fact that no rule or statute has been cited authorizing such a transfer, there is no reasonable basis to believe that the judge assigned to rule on the motion for rehearing would have any hesitation to rule impartially on the merits without regard to any of the matters asserted in this motion.

———o———

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the en banc motion should be denied.

Respectfully submitted,

SMATHERS & THOMPSON
1301 Alfred I. duPont Bldg.
169 East Flagler Street
Miami, Florida 33131
and
DANIELS AND HICKS, P. A.
1414 duPont Building
169 East Flagler Street
Miami, Florida 33131
(305) 374-8171

Attorneys for Appellants

By: /s/ MARK HICKS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to En Banc Motion to Vacate Court's Decision and to Transfer Case to Another District Court for Resolution was mailed this 11 day of October, 1984, to: MONTGOMERY, LYTAL, REITER, DENNEY & SEARCY, P. A., P. O. Drawer 3626, West Palm Beach, Florida 33402; and EDNA L. CARUSO, P. A., Suite 4B-Barristers Bldg., 1615 Forum Place, West Palm Beach, Florida 33401.

/s/ MARK HICKS

EXHIBIT "A"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

January Term 1983

CASE NO. 80-11650.

Opinion/Decision filed

AMERICAN MEDICAL INTERNATIONAL INC., PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., and T. R. BRUCE, JR.,

Appellants/
Cross-Appellees,

v.

ZBIGNIEW SCHELLER and FREDERICK P. HOBIN,

Appellees/
Cross-Appellants.

Appeal from the Circuit Court for
Palm Beach County;
Edward Rogers, Judge

Appeal from the (name administrative agency).

Mark Hicks of Daniel & Hicks, Miami;
Mercer K. Clarke of Smathers & Thompson, Miami, and Larry A. Klein, West Palm Beach, for appellants.

Edna L. Caruso and Montgomery, Lytal, Reiter, Denney & Searcy, P.A., West Palm Beach, for appellees/cross-appellants.

APPEALED: Final Judgment; Amended Final Judgment: Order Granting New Trial, And Final Judgment As To Costs.

RENDERED: September 2, 16, and 17, 1980.

SUBMITTED: OA: 4/27/1983

PANEL: Associate, Smith, Rupert J. (Beranek), Glickstein

PENDING MOTIONS:

AFFIRMED/REVERSED/OTHER: Reversed

PER CURIAM OPINION/DECISION BY:

DATE CONCURRING:

Beranek 10/18/83 J.

Glickstein 11/30/83 J.

DISSENTING:

With/Without Opinion

Rupert Smith 6/26/84 J.
Beranek 6/26/84 J.
Noted J.

Glickstein 6/28/84 J.
Noted J.

CONCURRING SPECIALLY:

With/Without Opinion

J.

Noted J.

Noted J.

CERTIFICATE

I HEREBY CERTIFY that on this 15th day of April, 1985, a true copy of the foregoing Appendix was mailed to MONTGOMERY, LYTAL, REITER, DENNEY & SEARCY, P.A., P. O. Drawer 3626, West Palm Beach, FL 33402; and EDNA L. CARUSO, P.A., 1615 Forum, Suite 4-B, Barristers Building, West Palm Beach, FL 33401.

/s/ MARK HICKS

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66, 655

ZBIGNIEW SCHELLER,

Petitioner,

v.

AMERICAN MEDICAL INTERNATIONAL, INC., et al.,

Respondents.

—o—

BRIEF OF RESPONDENT

—o—

Respectfully submitted,

SMATHERS AND THOMPSON
169 East Flagler Street
Miami, Florida 33131
and
DANIELS AND HICKS, P.A.
1414 duPont Building
169 East Flagler Street
Miami, Florida 33131-1268
(305) 374-8171

Attorneys for Respondent

TOPICAL INDEX

	PAGE
REPLY TO STATEMENT OF THE CASE AND FACTS	1-2
ARGUMENT	10
REPLY TO POINT I	2-8
A. There is no conflict with *West v. Troelstrup*, 367 S.2d 253 (Fla. 1st DCA 1979)	3-4
B. There is no conflict based upon the general principles relating to inconsistent positions and as to matters not raised at trial	4-5
C. There is no conflict with cases which hold that ambiguities in contracts are resolved by the jury	5-7
D. No conflict with cases which say that there can be tortious interference without a breach of contract	7-8
POINT II	8-10
CONCLUSION	10
CERTIFICATE OF SERVICE	10

TABLE OF CASES CITED

	PAGE
Adoption and Hot Line, Inc. v. Department of Health and Rehabilitative Services, 385 So.2d 682 (Fla. 3d DCA 1980)	4
Weak v. Weak, 21 Cal. Rptr. 9 (Calif. 1962)	4
West v. Troelstrup, 367 So.2d 253 (Fla. 1st DCA 1979)	3

REPLY TO STATEMENT OF THE CASE AND FACTS

Dr. Scheller's statement of the case and facts violates one of the most cardinal rules of appellate practice—it contains no record or appendix references of any kind. This fact alone demonstrates that there has been no conflict established because Dr. Scheller was unable to rely solely on the facts contained on the face of the Fourth District's opinion. Instead, Dr. Scheller has found it necessary to create a factual scenario which is both inaccurate and unsupported by the record.

For example, Dr. Scheller states that "[t]he contract was ambiguous . . .". (Pet. Br. p. 1). However, as noted by the Fourth District in its opinion, ". . . both parties agree . . ." that the termination clause in the contract providing for ninety days written notice ". . . is unambiguous." (Pet. App. 4). In addition, the Fourth District found that "[t]he two clauses in the employment contract . . . were unambiguous and unrelated." (Pet. App. 7). Thus, Dr. Scheller's argument is based upon a premise (i.e., ambiguity) which was not the basis of the Fourth District's holding. Since it is the holding of the Fourth District that must conflict with other decisions, Dr. Scheller's brief is fatally flawed.

Dr. Scheller next attempts to obfuscate the issue of conflict by totally ignoring the facts contained in the Fourth District's opinion, while at the same time, painting his own emotional picture of a hospital motivated solely by profit. While we deny the accuracy of Dr. Scheller's accusations, it is important to point out that they were all made without record references and none relate to the issue of conflict.

On page 3, Dr. Scheller claims that he was denied access to test results and to billing information. However, as noted on page 1 of the Fourth District's opinion, the evidence actually shows that at best Dr. Scheller's performance ". . . was made more difficult or burdensome by the "billing" and "access" problems created by the hospital." The Fourth District then agreed with our "overall position" which included that the evidence established no more than Dr. Scheller was "merely inconvenienced." (Pet. App. 11). The Fourth District then went on to hold that:

> The evidence was that no doctor breached his relationship with the plaintiff. Unsuccessful interference is simply not the kind of interference upon which a tort may be founded or upon which damages may be assessed. In the context of this case, the fact that no doctor abandoned or breached the existing relationship with Dr. Scheller was of crucial significance. Since the relationships between Dr. Scheller and the 63 designated physicians remained intact, there was no cause of action proved and the court should have also directed a verdict on Count III.

(Opinion, p. 11). Thus, it is clear that Dr. Scheller did not prove interference.

ARGUMENT

REPLY TO POINT I

DR. SCHELLER HAS FAILED TO ESTABLISH A CONFLICT BETWEEN DECISIONS ON THE ISSUE OF TORTIOUS INTERFERENCE WITH HIS CONTRACT

A. There is no conflict with *West v. Troelstrup*, 367 So. 2d 253 (Fla. 1st DCA 1979).

Dr. Scheller's first argument agrees with the Fourth District's determination that none of the 63 physicians

who designated Dr. Scheller abandoned or breached their relationship with him. However, Dr. Scheller argues that, "It is sufficient if Dr. Scheller was coerced into abandoning the relationship with the other physicians and his patients." Dr. Scheller argues that the two injunctions are proof that he abandoned his relationship with the physicians. This argument is nothing more than double talk.

As noted by the Fourth District, no physician or patient abandoned or restricted his relationship with Dr. Scheller. Dr. Scheller never contended below—and all of the evidence is to the contrary—that he abandoned anyone. The case was simply not tried on that theory and it is being created solely as a tool to create conflict where none exists. Thus, since neither "one" of the parties abandoned the relationship, there is no conflict with *West v. Troelstrup,* 367 So.2d 253 (Fla. 1st DCA 1979).

Dr. Scheller's reliance upon the injunctions is also misplaced. As noted by the Fourth District, the injunctive orders were not admitted into evidence and Dr. Scheller did not raise this as an issue on appeal. Thus, the injunctive orders are not proof of anything in this case, including the existence of interference. Significantly, it has been held that findings made in preliminary injunctive proceedings, particularly those entered in other cases, are not determinative of those issues at trial. *Adoption Hot Line, Inc. v. Department of Health and Rehabilitative Services,* 385 So.2d 682 (Fla. 3d DCA 1980). Injunctive orders are not admissible to prove the existence of certain material facts at trial. *See Weak v. Weak,* 21 Cal. Rptr. 9 (Calif. 1962).

In any event, the Fourth District examined the evidence which allegedly constituted interference as to "bill-

ing" and "access" to the lab and concluded that it amounted to no more than a mere "inconvenience" and not interference with a business relationship.

B. There is no conflict based upon the general principles relating to inconsistent positions and as to matters not raised at trial.

Under this point, Dr. Scheller string cites cases which stand for the general proposition that appellate courts may not rely on matters excluded from evidence or matters not raised below and that a party may not take inconsistent positions. (Pet. Br., p. 6). Again, there is no statement of law in the Fourth District's opinion which conflicts with these rules.

Dr. Scheller claims that these principles were violated because:

> The Fourth District premised its decision on the tortious interference with advantageous business relationship count on the fact that Dr. Scheller had obtained two injunctions. . . . Therefore, the Fourth District could not see how Dr. Scheller had sustained any *future* damages. (emphasis in original) (Pet. Br., p. 5).

An examination of the Court's opinion reveals that it did not premise its decision on the injunctions:

> Both of these injunctions were issued shortly before the main trial took place. The jury was not advised of the injunctions, but appellee has placed heavy reliance on the injunctions in argument before this court. No one has raised the question of how Dr. Scheller can get damages [emphasis in original] for future interference when that very interference has been twice enjoined by the court in suits between the same parties. *Since this issue has not been raised,*

> *we do not further address it.* [emphasis supplied]. (Opinion, p. 11).

It is clear from the foregoing that the court expressly rejected consideration of the injunctions as a basis for deciding the appeal. Consequently, the predicate upon which this point rests is without merit.

In any event, assuming *arguendo* that the injunctions played a role in the holding below (which is denied), it is clear from the decision and from Dr. Scheller's brief, that such injunctions were only relevant to ". . . damages for future interference." (Pet. App. 10). The Fourth District decided the issue of *liability* against Dr. Scheller and never reached the question of the propriety of the amount of damages awarded in view of the injunctions. Consequently, the injunction issue is not legally relevant for purposes of determining conflict.

C. There is no conflict with cases which hold that ambiguities in contracts are resolved by the jury.

Dr. Scheller argues that the contract was susceptible to more than one interpretation (i.e., ambiguous) and this issue should have been resolved by the jury. In support of his position, Dr. Scheller ignores the Fourth District's opinion and details the alleged facts, which are unsupported by a single record reference.

An examination of the Fourth District's opinion reveals an extensive discussion of the termination clause (Opinion, p. 19) and the clause dealing with independent contractors (Opinion, p. 7) and the conclusion that:

> The two clauses in the employment contract, No. Seven governing independent contractors and No. Nineteen

> governing termination, were *unambiguous and unrelated.* It was improper to rule that the entire contract became totally ambiguous and totally subject to construction and interpretation by the jury by virtue of the incorporation of the by-laws which contained everything but "the kitchen sink."
>
> Even indulging the argument that the contract was subject to construction, the eventual result remains the same under other established rules of contract law. A true ambiguity does not exist merely because a contract can possibly be interpreted in more than one manner. Indeed, fanciful, inconsistent, and absurd interpretations of plain language are always possible.
>
> * * *
>
> Dr. Scheller's theory of construction renders clauses seven and nineteen irreconcilable and totally destroys the unambiguous scope and intent of the contract was obviously not to confer a lifetime benefit on Dr. Scheller. The jury should not have been allowed to render totally ineffectual the clear termination provisions of the contract. (Opinion, pp. 7, 8; emphasis supplied).

It is clear from the foregoing that the Fourth District held that the contract was not ambiguous and that the two clauses were unrelated. In addition, the court found that Dr. Scheller's interpretation would not only be absurd, but it would render the termination clause ineffectual. A holding that there is no ambiguity does not conflict with cases which say that the presence of ambiguity requires a resolution by the jury.

D. No conflict with cases which say that there can be tortious interference without a breach of contract.

Dr. Scheller claims that the Fourth District's holding that there was no tortious interference with his contract is based improperly predicated upon its holding that there was no breach of contract. Dr. Scheller then argues that

if his contract was terminable with ninety days' notice, Florida law recognizes a cause of action for tortious interference for unlawfully inducing one party to terminate such a contract.

There are several problems with Dr. Scheller's point. To begin with, Dr. Scheller sued for a tortious interference with an alleged *lifetime* contract that was breached. He did not sue for tortious interference with a contract, which was terminated upon the giving of ninety days' notice. This was simply never pleaded and never raised by Dr. Scheller as an alternative claim in the trial court. As noted by the Fourth District:

> The plaintiff's second theory of recovery, intentional interference with the contract, must fail for the same reasons as outlined above. Under this count plaintiff relies on the same lifetime contract asserting interference rather than breach. We have previously held that the plaintiff's theoretical "lifetime—no replacement" contract simply did not exist. It is *this* contract which was supposedly interfered with. (Opinion, p. 8-9). [emphasis in original].

It is clear from the foregoing that there was no breach of contract because Dr. Scheller's lifetime contract theory did not exist as a matter of law and thus, the Fourth District held that there could be no interference. This is a correct statement of the law and the cases cited by Dr. Scheller are simply not applicable.

It is also clear that on page 9 of the Fourth District's opinion, it states that assuming Dr. Scheller had claimed an interference with a contract terminable with ninety days' notice, "there was no breach of this contract even if we indulge the two hat theory", and the "plaintiff's proofs did not establish the basic elements of the cause of

action [intentional interference] and the court should have also directed a verdict on this count." (Opinion, p. 9).

There is nothing about the foregoing which states that there could be no interference with a terminable at will contract because there was no breach of that contract. Instead, the Fourth District indulged in a hypothetical and concluded that there was both no breach of a contract terminable in ninety days and no interference with such contract because the elements of the cause of action were absent under the record before it.

It is apparent that Dr. Scheller's basic premise under this point is incorrect and in any event, a hypothetical discussion—as opposed to a holding—cannot create conflict.

POINT II

THE FOURTH DISTRICT'S REFUSAL TO VACATE OR TRANSFER THIS CASE DOES NO CONFLICT WITH ANY DISCUSSIONS

Under this point, Dr. Scheller does not look to the decision of the Fourth District for conflict. Rather, he directs his conflict argument to a denial of his "motion to vacate and/or transfer", based upon the fact that Judge Beranek went into partnership with Larry Klein after the bench.

The simple answer to this point is that conflict can only be established by demonstrating that the Fourth District's decision "expressly and directly conflict[s] with a decision of another district court of appeal or of the Supreme Court on the same question of law." Florida Rules of Appellate Procedure, Rule 9.303(a)(2)(iv). This point involves the denial of a motion by the Fourth District and

has nothing to do with its holding. Thus, no conflict can exist.

In any event, a detailed discussion of this issue is contained in AMI's "Response to En Banc Motion to Vacate Court's Decision and to Transfer Case to Another District Court for Resolution." (AMI's App. 1-5). A summary of that response is as follows:

(a) The so-called "en banc" motion was not filed timely.

(b) The record showed that Judge Beranek wrote the majority opinion nine months before it was released and the delay in publishing the opinion was caused by the length of time that Judge Rupert Smith kept file in drafting his dissent. This does not create an appearance of impropriety.

(c) Judge Downey was assigned to the case after Judge Beranek left the bench. He considered all post decision motions and he agreed with the holding of the original panel in thise case.

(d) There is no legal authority which allows one district court of appeal to transfer a case to another district court of appeal.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that no conflict exists and Dr. Scheller's petition should be denied.

Respectfully submitted,

SMATHERS AND THOMPSON
169 East Flagler Street
Miami, FL 33131
-and-
DANIELS AND HICKS, P.A.
1414 duPont Building
Miami, FL 33131-1268
(305) 374-8171

By /s/ Mark Hicks

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 1985, a true copy of the foregoing Brief of Respondents was mailed to MONTGOMERY, LYTAL, REITER, DENNEY & SEARCY, P.A., P. O. Box 3[illegible] West Palm Beach, FL 33402; and EDNA L. CARUSO, ESQ., 1615 Forum Place, Suite 4B, Barristers Bldg., West Palm Beach, FL 33401.

/s/ Mark Hicks

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,655

ZBIGNIEW SCHELLER,

Petitioner,

AMERICAN MEDICAL INTERNATIONAL, INC., et al.,

Respondents.

RESPONSE TO AMENDED BRIEF OF PETITIONER ON JURISDICTION

SMATHERS & THOMPSON
169 East Flagler Street
Miami, Florida 33131
and
DANIELS AND HICKS, P.A.
1414 duPont Building
169 East Flagler Street
Miami, Florida 33131-1268
(305) 374-8171

Attorneys for Respondent

RESPONSE TO AMENDED PORTIONS OF JURISDICTIONAL ARGUMENT

On page 8 of Petitioners brief, Dr. Scheller added a section E which argues that the Fourth District's opinion conflicts with those cases which hold that nominal damages are sufficient to support an award of punitive damages.

The basic fallacy in Dr. Scheller's argument is that the Fourth District decided the issue of *liability* against him and never reached the issue of damages.

Accordingly, no conflict can possible exist.

On page 9, Dr. Scheller adds a new Point III, which argues that he has been denied his constitutional right to a jury trial and to an impartial appellate forum.

The Fourth District's opinion does not discuss any constitutional issues. It simply decided this case on the merits applying established rules relating to direct verdicts. Thus, there can be no conflict of decisions.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that no conflict exists and Dr. Scheller's petition should be denied.

Respectfully submitted,

SMATHERS AND THOMPSON
169 E. Flagler Street
Miami, Florida 33131
and
DANIELS AND HICKS, P.A.
1414 duPont Building
Miami, Florida 33131-1268
(305) 374-8171

By /s/ Elizabeth K. Clarke
For Mark Hicks

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of April, 1985, a true copy of the foregoing Brief of Respondents was mailed to MONTGOMERY, LYTAL, REITER, DENNEY & SEARCY, P.A., P.O. Box 3626, West Palm Beach, Florida 33402; and EDNA L. CARUSO, ESQ., 1615 Forum Place, Suite 4B, Barristers Building, West Palm Beach, Florida 33401.

By /s/ Elizabeth K. Clarke